



DEFAULT AWARD

Case Number: **NWKD2652-19**
Commissioner: **Brunhilde Frohnapfel**
Date of Award: **10-Nov-2019**

In the **ARBITRATION** between

PSA obo Mojaki, OA

(Union/Applicant)

and

Department of Water and Sanitation

(Respondent)

Union/Employee's representative: **Mrs. Zhulfa Graaff**

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DETAILS OF HEARING AND REPRESENTATION

1. The dispute is referred in terms of section 6 (4) of the Employment Equity Act 55 of 1995, as amended (the EEA here after).
2. The arbitration was heard at CCMA House Klerksdorp (North West) on 31 October 2019.
3. The applicant Mr. Andrew Mojaki attended. He was represented by Mrs. Zhulfa Graaff, an official of the Public Servants Association.
4. The respondent, the North West Department of Water and Sanitation, was absent and not represented. The CCMA had notified it on 02 October 2019 via e-mail to: GayaparsadPravesh@dws.gov.za. Mrs. Greeff explained Mr. Pravesh is the respondent's national Labour Employee Officer.
5. The proceedings were digitally recorded.

ISSUE TO BE DECIDED

6. The applicants allege unfair discrimination on an arbitrary ground, i.e. geographical location, in terms of section 6 (4) of the EEA.

BACKGROUND

7. The applicant is employed since 2 June 1987 as a Messenger on salary level 2, at the respondent's regional office in Potchefstroom, North West region.
8. In 1989 he was promoted to Driver-messenger at salary level 3.
9. On 01 September 2008 the salary level of the Driver-Messengers in Gauteng were increased to level 4. The applicant remained at salary level 3.
10. In May 2019 the applicant became aware of the difference in wages between himself and the comparators. The dispute was referred to the CCMA on 24 July 2019.

11. The applicant seeks to be upgraded to salary level 4 retrospectively from 01 September 2008, the date on which the salary level of the Gauteng comparators changed from level 3 to 4.

SURVEY OF EVIDENCE AND ARGUMENTS

The applicant's testimony given under oath:

12. The applicant contends he is unfairly discriminated upon the arbitrary ground of geographical location, in that he performs the same work and yet are paid less than his counterparts in the Gauteng region.
13. He became aware of the wage discrepancy in May 2019, after conversing with a colleague, employed as Messenger -Driver in Gauteng.
14. He then approached the Human Resources Department, where Mrs. Le Roux confirmed the comparators were on level 4. Mrs. Le Roux asked Mrs. Antoinette to calculate the back pay and annual bonus due to him since 01 September 2008. Mrs. Antoinette did so on the Persal system.
15. Thereafter he obtained a Job Evaluation Certificate from Mr. Marius, which shows his income should be on level 4.
16. He then filed a grievance. At the grievance, the Head of Corporate Services Mr. Sydney Mabola and Mr. Pravesh looked at his supporting documents; they confirmed he should be on level 4. They also assured he would be upgraded to level 4.
17. Three weeks later he phoned Mr. Pravesh, requesting written confirmation of the upgrade. Mr. Pravesh replied he was in too much of a hurry. By date of arbitration he remains on level 3.
18. His annual performance appraisal report (Bundle A, page 28) confirms he is employed as a Messenger-Driver, as the comparators also are.

ANALYSIS OF EVIDENCE AND ARGUMENT

The statutory setting

1996 Constitution of the RSA

19. Section 9(3) of the 1996 Constitution of the Republic of South Africa states that, *'the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'*.
20. Furthermore, section 9(4) of the Constitution states that, *'no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination'*.

The International Labour Organisation (ILO) Equal Remuneration Convention 1951 (100)

21. The International Labour Organisation (ILO) Equal Remuneration Convention 1951 (100), which South Africa ratified in 2000, obliges ratifying member States to give effect to the principle of equal pay/remuneration for work of equal value.

Employment Equity Act 55 of 1998 ("the EEA")

22. Section 6(1) of the EEA provides:

"No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnical social origin, colour, sexual orientation, age, disability, religion, HIV status, conscious, belief, political opinion, culture, language, birth or on any other arbitrary ground."

23. Section 6 (4) of the EEA (as amended) provides:

"A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination."

Employment Equity Regulations, 2014

24. Regulation 3 mandates employers, in order to eliminate unfair discrimination, to take steps to eliminate differences in terms and conditions of employment, including remuneration of employees who perform work of equal value if those differences are directly or indirectly based on a listed ground or any

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arbitrary ground that is prohibited by section 6 (1) of the EEA. An employer must ensure that employees are not paid different remuneration for work of equal value.

Regulation 5 prescribes the methodology to be followed when applying section 6(4) of the Act-

(1) It must first be established

(a) Whether the work concerned is of equal value in accordance with regulation 6; and

(b) Whether there is a difference in terms and conditions of employment.

(2) It must then be established whether any difference in terms of subregulation (1) (b) constitutes unfair discrimination, applying the provisions of section 11 of the Act.

The Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices (HR Code)

25. Clause 12.1 requires all employers covered by the EEA to ensure that remuneration policies and practices are applied consistently without unfair discrimination on the basis of any one or combination of the prohibited grounds.
26. Clause 12.3.3. Where barriers or discrimination in remuneration are identified, and unless these can be justified, the employer should in consultation with stakeholders develop a strategy for barrier removal.
27. Clause 5.1 Implementing employment equity involves two key initiatives: (1) eliminating unfair discrimination in human resource policies and practices in the workplace; and (2) designing and implementing affirmative action measures to achieve equitable representation of designated groups in all occupational categories and levels in the workplace.
28. Clause 5.2.3 Equality can involve a formal notion of treating everyone who is in a similar position the same. This can perpetuate unfairness when those who hold similar positions e.g. all senior managers have different needs and circumstances that impact on their ability to perform effectively. The Constitution requires employers to move beyond formal equality to substantive equality by acknowledging the differences between employees and treating them differently on the basis of those differences. This is necessary to ensure that all employees are treated fairly. Equity therefore invokes

the requirement of 'fair' treatment in order to achieve substantive equality as an outcome in the workplace. Equal treatment and equal opportunity, like equality, subjects everyone to the same rules without distinction. Equity requires changing the rules so that their application is fair.

Onus in terms of section 11 of the EEA

29. The union alleges discrimination on the arbitrary ground of geographic location. Section 11(2) has application and provides:

"If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that –

- (a) the conduct complained of is not rational;*
- (b) the conduct complained of amounts to discrimination; and*
- (c) The discrimination is unfair. "*

30. After the amendment of section 11 of the EEA, the court held in **Sethole & others v Dr Kenneth Kaunda District Municipality**¹:

... [E]ven if Section 11 of the EEA after its amendment is considered, there is a clear distinction, where it comes to the issue of who bears the onus, between a case of discrimination based on one of the listed grounds in Section 6(1) of the EEA, and a case based on any other unlisted arbitrary ground. In the case of a claim of discrimination based on a listed ground, an allegation of such kind of discrimination by a complainant suffices, and the onus is then on the respondent party to prove it does not exist. But in the case of a discrimination claim based on any other unlisted arbitrary ground, the onus is on the complainant to prove that discrimination based on that ground exists. Considering that the applicants' claim is squarely based on such an unlisted arbitrary ground, they would in any event bear the onus to prove the existence of discrimination, in terms of Section 11(2) of the EEA, as it stands after amendment."

31. In **Kroukam v SA Airlink (Pty) Ltd**² Davis JA held:

"In my view, section 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show

¹ [2018] 11 BLLR 74 (LC) par [25].

² [2005] 12 BLLR 1172 (LAC) par [28].

that the reason for the dismissal did not fall within the circumstance envisaged in s 187 for constituting an automatically unfair dismissal."

32. Even though **Kroukam** dealt with the burden of proof in an alleged automatically unfair dismissal, it provides guidance which I consider applicable to the dispute before me: the applicants are required to show on a balance of probabilities, in line with section 11 (2) of the EEA, that Mr. Mojaki is subjected to conduct which is not rational, amounts to discrimination and is unfair. The respondent then has to produce evidence to prove the contrary.
33. The applicants are required to show, on a balance of probabilities, that the ground relied upon is an arbitrary ground analogous to the listed grounds; the conduct complained of is not rational, amounts to discrimination and the discrimination is unfair.

Is geographical location an arbitrary ground?

34. The Labour Court³ held geographical location is an arbitrary ground and same was confirmed by the Labour Appeal Court⁴.
35. Zondo JP held in the LAC judgment the complainant was required to establish a link between the alleged unfair differentiation; that is a difference in remuneration for what she considered to be the same work or work of equal value, and her geographical location. See **Mangena and others v Fila South Africa (Pty) Ltd and others** (2010) 31 ILJ 662 (LAC) (*Mangena*). The complainant had to show there was an adequate factual foundation to sustain the claim that respondent was on a salary notch which was unjustified because of her geographical location. It is this factual foundation which permits a court to examine whether the complainant suffered an assault to her dignity and whether her rights or interests have been unfairly affected.

Is the conduct complained of rational?

36. From the applicant's evidence, it is evident the respondent agreed the work done is the same and there is a difference in terms and conditions of employment, specifically remuneration. As a result, both the Head of Corporate Services and the National Labour Employee Officer Mr. Pravesh confirmed he should be paid at level 4.

³ Duma v Minister of Correctional Services and Others (C604/2012) [2016] ZALCCT 6; (2016) 37 ILJ 1135 (LC); [2016] 6 BLLR 601 (LC) (2 February 2016).

⁴ Minister of Correctional Services and Others v Duma (CA10/2016) [2017] ZALAC 78 (23 June 2017).

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37. Special defences were at the respondent's disposal, such as affirmative action and inherent job requirements⁵, but same were not raised, as the respondent failed to attend the arbitration.
38. The respondent also had to its disposal the factors listed in regulation 7 of the Employment Equity Regulations, to show the differentiation in the terms and conditions of the applicant and comparators is fair, rational and justified. None of these were raised, as the respondent failed to attend the arbitration.
39. The applicant and the comparators do the same work, which is of equal value and yet are paid differently based on their geographical location.
40. The applicants have shown the conduct is not rational, whereas the respondents did not show the contrary.

Does the conduct amount to discrimination?

41. In **Harksen v Lane NO**⁶ the Constitutional Court held there will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.
42. In the matter at hand, the differentiation is linked to geographical location, which has been held to be an arbitrary ground by the Labour Court, wherein the LC⁷ held geographical location is an arbitrary ground and same was confirmed by the LAC⁸
43. In terms of section 6 (4) of the EEA, a difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value, amounts to discrimination when the difference is directly or indirectly based on one or more of the grounds listed in section 6 (1) of the Act.
44. As such the differentiation based on geographical location, amounts to discrimination in line with section 6 (4) of the Act.

Is the discrimination unfair?

⁵ Section 6 (2) (a) and (b) of the EEA.

⁶ 1998 (1) SA 300 (CC).

⁷ Duma v Minister of Correctional Services and Others (C604/2012) [2016] ZALCCT 6; (2016) 37 ILJ 1135 (LC); [2016] 6 BLLR 601 (LC) (2 February 2016).

⁸ Minister of Correctional Services and Others v Duma (CA10/2016) [2017] ZALAC 78 (23 June 2017).

45. In **Prinsloo v Van der Linde** 1997 (3) SA 1012 (CC), the Constitutional Court held that unfair discrimination 'principally means treating people differently in a way which impairs their fundamental dignity as human being'.
46. Thus, in order to be found unfair, the impact of discrimination must impair the persons' fundamental human dignity in an adverse manner.
47. To determine whether the ground alleged constitutes unfair discrimination, recourse must be had to the *dictum* of Ngcobo J (as he then was) in **Hoffmann v SA Airways**:⁹

*'At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant consideration in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interest of the victim of the discrimination have been affected and whether the discrimination has impaired the human dignity of the victim.'*¹⁰

48. In **Harksen v Lane N.O.** ¹¹ the Constitutional Court repeats the above factors which must be considered when determining whether the discrimination is unfair:

The position of complainant in society and whether victim has been subjected to past patterns of discrimination

- 48.1. Mr. Mojaki, as a "black" male falls within the designated groups, which groups have historically been subjected to past patterns of discrimination under the apartheid-regime.

The nature of the discriminating law or action and its purpose. Is its purpose to achieve a worthy and important societal goal?

- 48.2. The respondents failed to deal with the purpose of the differentiation between the applicants and the comparators. A worthy and important societal goal is the elimination of unfair discrimination and the achievement of substantive equality, yet the discrimination between the applicants and comparators does not advance this goal.

⁹ 2001 (1) SA 1 (CC).

¹⁰ At para 27.

¹¹ 1998 (1) SA 300 (CC) at 325 A-D.

The extent to which the complainants' rights have been impaired

- 48.3. The complainants' rights to equality and dignity are entrenched by sections 9 and 10 of the Bill of Rights (Constitution 1996).
- 48.4. He is disadvantaged by the inequality, as the comparators' wages have increased in 2008 and whilst his wages remain at level 3 and he consequently has earned less than the comparators since 2008.

The extent to which the applicant's fundamental dignity has been impaired?

- 48.5. O'Regan J comments in **S v Makwanyane and Another**¹² at para 328:

"The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in Chapter 3."

- 48.6. Sachs J comments on dignity in **National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others**¹³ at [124] to [126];

[124] Contrary to the Centre's argument, the violation of dignity and self-worth under the equality provisions can be distinguished from a violation of dignity under section 10 of the Bill of Rights. The former is based on the impact that the measure has on a person because of membership of a historically vulnerable group that is identified and subjected to disadvantage by virtue of certain closely held personal characteristics of its members; it is the inequality of treatment that leads to and is proved by the indignity. The violation of dignity under section 10, on the other hand, contemplates a much wider range of situations. It offers protection to persons in their multiple identities and capacities. This could be to individuals being disrespectfully treated, such as somebody being stopped at a roadblock. It also could be to members of groups subject to systemic disadvantage, such as farm workers in certain areas, or prisoners in certain prisons, such groups not being identified because of closely held characteristics, but because of the situation they find themselves in. These would be cases of indignity of treatment leading to inequality,

¹² 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC).

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rather than of inequality relating to closely held group characteristics producing indignity.

[125] Once again, it is my view that the equality principle and the dignity principle should not be seen as competitive but rather as complementary. Inequality is established not simply through group-based differential treatment, but through differentiation which perpetuates disadvantage and leads to the scarring of the sense of dignity and self-worth associated with membership of the group. Conversely, an invasion of dignity is more easily established when there is an inequality of power and status between the violator and the victim.

[126] One of the great gains achieved by following a situation-sensitive human rights approach is that analysis focuses not on abstract categories, but on the lives as lived and the injuries as experienced by different groups in our society. The manner in which discrimination is experienced on grounds of race or sex or religion or disability varies considerably - there is difference in difference. The commonality that unites them all is the injury to dignity imposed upon people as a consequence of their belonging to certain groups. Dignity in the context of equality has to be understood in this light. The focus on dignity results in emphasis being placed simultaneously on context, impact and the point of view of the affected persons. Such focus is in fact the guarantor of substantive as opposed to formal equality."

48.7. The State appears content with the status quo, as by date of the arbitration, it has not honoured its undertaking to upgrade the applicant to level⁴.

48.8. The respondent failed to treat the applicant with respect for his constitutional right to dignity. He performs the same work as the comparators and the respondent, despite being aware of the discrepancy, has not corrected same.

49. The applicants have met the onus of proving that the discrimination was unfair.

Remedy

50. Section 48 of the EEA assigns the following powers to Commissioners in arbitration proceedings-

¹³ (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999).
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- (1) *A commissioner of the CCMA may, in any arbitration proceedings in terms of this Act, make any appropriate arbitration award that gives effect to a provision of this Act.*
- (2) *An award made by a commissioner of the CCMA hearing a matter in terms of section 10(6)(aA) or (b) may include any order referred to in section 50(2)(a) to (c), read with the changes required by the context, but an award of damages referred to in section 50(2)(b) may not exceed the amount stated in the determination made by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act.*

51. Section 50(2)(a) to (c) reads:

- (2) *If the Labour Court decides that an employee has been unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstances, including-*
 - (a) *payment of compensation by the employer to that employee;*
 - (b) *payment of damages by the employer to that employee;*
 - (c) *an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees;*

52. The applicants' prayer is that the respondent be ordered to upgrade the applicant to grade 4, with retrospective effect to 01 September 2008.
53. The retrospective effect include payment of the monetary value of the difference in remuneration between what the applicant had earned on level 3 and what he would have earned had he been upgraded to level 4, for the period 01 September 2008 to date the upgrade is effected, subject to the usual statutory deductions.
54. The applicants have not provided any computation regarding remuneration but explained the respondent had and thus will be able to calculate the amount due by using the Persal system.

Costs

55. The applicants also seek a cost order, for the travel costs of Mrs. Graaff and Mr. Mojaki, as the respondent was aware of the wage discrepancy and could have taken steps to correct it, but did nothing to do so, which necessitated the applicants' referral to the CCMA.
56. On 31 October 2019 Mrs. Graaff of the PSA travelled from Mahikeng to Klerksdorp and back to Mahikeng, at R3, 61 per kilometre, to the cost of R1299, 60. Mr. Mojaki travelled from Potchefstroom to Klerksdorp and back, at cost of R353, 78 (R3, 61 per kilometre).
57. In line with CCMA Rule 39, I find the respondent's failure to correct the discrepancy, despite being aware of same, resulted in undue costs for both the PSA and Mr. Mojaki. As such I find it fair to award costs against it.

AWARD

58. The applicants discharged the onus of proving that the discrimination is unfair.
59. The respondent is ordered to upgrade Mr. Oupa Andrew Mojaki, from salary grade 3 to salary grade 4, with retrospective effect to the 1st of September 2008 to date the upgrade is effected, which upgrade must be done within the 2019/2020 financial year of the respondent.
60. The retrospective effect includes payment of the monetary value of the difference in remuneration between what the applicant had earned on level 3 and what he would have earned had he been upgraded to level 4, for the period 01 September 2008 to date the upgrade is effected, subject to the usual statutory deductions.
- 60.1. The parties are advised to reach consensus on the amount/s due and should same fail, either party to approach the CCMA for variation of the award, in which application the quantified amount/s and calculation thereof must be provided.

61. The respondent is ordered to pay the travel costs of Mrs. Graaff in her capacity as PSA official, to the amount of R1299, 60 by no later than 30 November 2019.
62. The respondent is ordered to pay the travel costs of Mr. Mojaki to the amount of R353, 78 by no later than 30 November 2019.



Signature: _____

Commissioner: **Brunhilde Frohnappel**

Sector: **Business/Professional services**